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78-1303

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

BEATRICE M. CHISNELL,
Respondent,

vs.

ROBERT LLOYD CHISNELL,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

BEATRICE M. CHISNELL,
Respondent,

vs.

ROBERT LLOYD CHISNELL,
Petitioner.

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the final Order of the Supreme Court of the State of Michigan entered herein on November 29, 1978, affirming the decision of the Court of Appeals, State of Michigan, and the Decision of the Circuit Court of the State of Michigan for the County of Macomb.

OPINION BELOW

The Order denying the Application for Leave to Appeal in the Michigan Supreme Court was entered on November 29, 1978, and is not reported; it is printed in Appendix A at Page 1a, infra. The Opinion of the Michigan Court of Appeals is recorded at 82 Michigan Appeals 699 and 267 NW 2d, 479. This opinion is printed in Appendix A at Page 3a, infra. The Judgment of Divorce is printed in Appendix A at Page 11a, infra.

JURISDICTION

The Order Denying the Application for Leave to Appeal of the Michigan Supreme Court was made and entered on November 29, 1978. This Petition was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 USC 1257 (3). Further, jurisdiction is invoked pursuant to Rule 19 of Rules of the United States Supreme Court, Section 1 (a), where a state court has decided a federal question of substance not theretofore determined by this Court or has decided it in a way not in accord with applicable Decisions of this Court.

QUESTIONS PRESENTED

I HAS THE UNITED STATES PREEMPTED THE FIELD OF CHARACTERIZATION OF FEDERAL MILITARY RETIREMENT PAY BENEFITS BY VIRTUE OF ITS EXCLUSIVE LEGISLATIVE JURISDICTION, VIA THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION, THUS PRECLUDING THE STATE OF MICHIGAN AND ANY OTHER STATE FROM JUDICIALLY DIVESTING PETITIONER OF ALL OR A PORTION OF HIS RETIREMENT PAY?

II IN LIGHT OF THE FACT THAT FEDERAL COURTS HAVE CLEARLY DISTINGUISHED BETWEEN FEDERAL PENSIONS AND FEDERAL MILITARY RETIREMENT PAY AND HAVE CHARACTERIZED MILITARY RETIREMENT PAY AS A CONTINUATION OF ACTIVE DUTY PAY ON A REDUCED BASIS, DOES THIS CHARACTERIZATION PRECLUDE THE MICHIGAN COURTS AND ANY OTHER COURT FROM CHARACTERIZING SUCH MILITARY RETIREMENT PAY SOLELY AS COMPENSATION FOR PAST SERVICES, OR IN THE ALTERNATIVE, AS A MARITAL ASSET, IN ORDER THAT SAID

COURTS MIGHT FIND SUFFICIENT JURISDICTIONAL BASIS TO ORDER AN EQUAL DIVISION OF SAID RETIREMENT PAY PURSUANT TO THE MARITAL PROPERTY LAWS?

STATEMENT OF THE CASE

The facts relevant to the questions presented by this Petition may be introduced to the Court, as follows:

Robert Lloyd Chisnell was the Defendant in the original Complaint for Divorce filed in the Circuit Court for the County of Macomb, State of Michigan, on December 18, 1975. The Respondent, Beatrice Chisnell, was the Plaintiff.

The parties hereto were married on October 22, 1955. Petitioner had joined the United States Army in 1944, and remained on active duty until 1953, when he left the military service for an approximate period of eighteen (18) months. Prior to the marriage in 1955, Petitioner reenlisted in the army and was honorably retired from the same in 1972 as a Chief Warrant Officer, Fourth Class. At the time the divorce was entered, the Petitioner was receiving approximately Nine Thousand Six Hundred and no/100 ($9,600.00) Dollars per year as retirement pay.

The nature, character and status of compensation received by Petitioner and similarly situated retired officers of the United States Army was fully argued in the Circuit Court for the County of Macomb, State of Michigan, the original trial court, and also in the Michigan Court of Appeals and the Michigan Supreme Court, and briefs were filed therein.

The Judgment of Divorce entered on April 21, 1977, provided in part that the Respondent was to receive, for the rest of her life, the sum of Three Hundred Twenty and no/100 ($320.00) Dollars per month as a portion of Petitioner's military retirement pay. This sum represents

approximately 50 percent of Petitioner's retirement pay after income taxes on a monthly basis.

The Michigan Court of Appeals affirmed the Judgment of Divorce with reference to the allocation of a portion of Petitioner's military retirement pay to the Respondent. The Court of Appeal's Opinion is recorded at 82 Michigan Appeals 699; 267 NW 2d 479, 1978.

The Michigan Supreme Court denied Petitioner's Application for Leave to Appeal on November 29, 1978, a copy of which is reproduced in Appendix A.

ARGUMENT

I THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT IN THAT IT DISREGARDED THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION, ARTICLE VI, CLAUSE 2, AND THE PREEMPTIVE AUTHORITY OF THE UNITED STATES CONGRESS IN THE AREA OF FEDERAL MILITARY BENEFITS.

Petitioner contends that his military retirement pay is within the sole and exclusive realm of the United States Congress, and that any state court intervention with his right to receive his benefits is precluded by operation of the Supremacy Clause of the United States Constitution, Article VI, Clause 2:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Judicial fiat cannot alter, amend or enlarge the statutory plan that Congress has established for the payment of services rendered or to be rendered in the United States Army.

The United States Constitution in Article I, Section 8, gave Congress the power "to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years."

This language, written by the founding fathers of our system of government, clearly and unequivocally set the broad powers to raise and support armies in the federal Congress. The failure of the trial court to follow the dictates of the Federal Constitution works an undue hardship on Petitioner and those similarly situated, and conflicts with the exclusive jurisdiction of Congress.

Petitioner was a member of the United States Army for some twenty (20) years and had achieved the rank of Chief Warrant Officer, fourth class, prior to his retirement in 1972. (T5). Petitioner was retired pursuant to the Authority of 10 USC 3911, et seq., and the General Military Law 10, USC 1293. At the time of Petitioner's retirement, he did not exercise his option to establish a survivor benefit annuity pursuant to 10 USC 1447 to 1455.

The United States Supreme Court in *Wissner* v *Wissner* 338 US 655, 70 S. Ct. 398, 94 L ED 424, (1950), dealt with a similar military benefit-supremacy problem. In *Wissner*, the U.S. Veterans Administration made monthly installment payments to the mother of a deceased army officer, whom he had named as principal beneficiary on his army life insurance. His widow, claiming to be entitled under community property law to half of the proceeds, obtained a judgment in the state courts in California. The United States Supreme Court in *Wissner* reversed the state court decision holding the congressional life insurance scheme constitutional and the state court intervention a violation of the Supremacy Clause.

The *Wissner* court at 338 U.S. at 659, 70 St. Ct. at 400, noted the impact of the state court determination on the congressional intent.

> Whether directed at the very money received from the government or an equivalent amount, the judgment below nullifies the soldier's choice and frustrates the deliberate purpose of Congress.

Wissner provides certain fundamental requirements that must be met to consider the retirement as the separate interest of the retired serviceman:

1. That the military retirement pay must be intended as a method which might directly enhance the morale of the serviceman. (338 U.S. at 660, 70 S. Ct., at 401).

2. That Congress must have intended military retirement pay to be paid from Congressional appropriations (338 U.S. at 658, 70 S. Ct. at 399).

3. That Congress must have intended the cost of administering the military pay system to be borne by the United States. (338 U.S. 658, 70 S. Ct. at 399).

4. The Congress must have intended the Federal Military Retirement Pay System to afford as much material protection as possible to the serviceman. (338 U.S. 660, 70 S. Ct. at 401).

It is uncontrovertible that the legislative history of a statute is the proper source to ascertain the intent of Congress as to its ultimate purpose. *United States* v. *Wise*, 370 U.S. 405, 414, 82 S. T. 1354, 1360 (1962). The legislative history of an act includes debates and discussions on the floor of the Congress, as well as committee reports. *United States* v *City and County of San Francisco*, 310 U.S. 16, 60 S. Ct. 749, 1940.

Space does not permit a full demonstration of all pertinent acts and comments thereto. However, Petitioner

relies on an overview of many Congressional acts as conclusive evidence that the federal military retirement pay is his separate interest and meets the criteria set forth in *Wissner*.

It is clear that Congress was primarily concerned about raising the morale of the men in the armed services in enacting the entire system of military retirement. The Act of February 21, 1946, that being an Act to Provide Additional Inducement to Citizens of the United States to make a career of the United States Military, Ch. 34, Sect. 6, 60 Stat. 27, PL. 79-305, was enacted for the purpose of inducing young men to make a career of the armed services. Congress provided the servicemen with specific incentives to remain in the service for at least 20 years. These incentive included four provisions in the area of retirement; the statutory age of retirement was lowered, a new system to compute retirement pay was established, a man was allowed to retire after only 20 years of service, and the serviceman was not required to make any contribution to his retirement.

The following excerpt from the Congressional record of a dialogue between Messrs. Cochran and Vinson is illustrative of the fact that Congress specifically undertook to have the benefits paid from Congressional appropriations. The dialogue refers to the act of February 21, 1946, and reads as follows:

> Mr. Cochran, representative from Missouri:
>
> "They get so much of their basic pay when they retire?"
>
> Mr. Vinson, "exactly."
>
> Mr. Cochran, "They never contributed one nickel toward any retirement fund. Is that correct?"
>
> Mr. Vinson, "That is absolutely correct."
>
> (91 Cong. Rec. 12465)

That Congress must have intended the cost of administering the Military Retirement Pay System be borne by the United States is obvious, based on the fact that no premiums or contributions are required to be paid by the servicemen, all liabilities are paid from Congressional appropriations and the cost of administering the system are borne by the United States. Congressional comment during the debate over the Pay Readjustment Act of 1958, act of June 1, 1958: 72 Stat 122, Pub. Law 85-422 is very informative:

> Fortunately, we have for our military personnel the most liberal retirement provisions our sub-committee was able to learn about anywhere in the world. Retirement compensation is paid by the federal government . . . as yet it has not been necessary to care for any contributions by the personnel involved. The retirement is paid for by direct appropriations, with no contribution.
>
> 104 Cong. Rec. 7613; remarks of Senator Stenus of Mississippi.

That Congress intended the Federal Military Retirement System to afford as much material protection as possible to the retiree is also evident from excerpts of the Congressional record. A cost of living index provision was added to the Military Retirement Pay Scheme by Act of October 2, 1963, Sect. 5 (h) (4), 77 Stat. 214, Pub. L 88 132. Mr. Cannon, a representative from Missouri, at 109 Cong. Rec. 14200, made the following comment:

> First to improve the attraction and retention of service members for career military service by providing increased basic pay with the larger percentages increases at points of retention; Second, to correct certain inequities in the military compensation (and retirement) system; Third, to provide for a permanent statutory matter an equitable basis for adjusting retired pay for members after retirement, based on cost of living increases, applicable to all retired personnel.

Through the test established in *Wissner, supra,* Petitioner has demonstrated that Congress specifically intended federal military retirement pay to be the separate interest of the recipient. Respondent played no role in the establishment of the retirement system nor in meeting its requirements to secure its benefits.

Petitioner respectfully submits that the case of *Hisquierdo* v *Hisquierdo,* 566, P 2d 224, which was reviewed by the United States Supreme Court, file No. 77-533, argued November 1, 1978, decided January 22, 1979, is most analogous to the case at bar. This Honorable Court in *Hisquierdo* held that under the Supremacy Clause of the United States Constitution that the State of California, pursuant to its community property laws, *could not* interfere with the federal Railroad Retirement Act of 1974 and reversed the decision of the California Supreme Court. The California Supreme Court had applied its community property principles in granting Mrs. Hisquierdo an interest in her husband's railroad retirement benefits. The U.S. Supreme Court, at page 3 of its slip opinion, indicated that railroad retirement benefits are not contractual and may be altered or eliminated by Congress at any time. It should be noted that these similar principles govern the status of military retirement benefits. The case at bar as well as the *Hisquierdo* case dealt with the allocation of federal entitlements. The slip opinion of the United States Supreme Court in *Hisquierdo* at page 11, set forth the applicable tests in considering the application of the Supremacy Clause in a family law related area.

> The pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal programs to require non-recognition.

Petitioner respectfully submits that the decisions of the Michigan courts in the case at bar are in clear conflict with the expressed terms of the federal military retirement statutory provisions and that they injure the objectives of the federal program. The references to the legislative history set forth herein establishes the objectives of the federal military program and the determinations made by the Michigan courts clearly obstruct and interfere with the objectives.

The decision of the Michigan court, as well as the numerous decisions of the community property states, in contrast to the decisions of the Colorado Supreme Court and the Arkansas Supreme Court, clearly sets forth a system of non-uniformity and creates an atmosphere which gives rise to forum shopping.

It is Petitioner's contention that the United States has exclusive jurisdiction to characterize a federally created right and that the states cannot operate in the area until or unless the state law has been absorbed as the federal rule. Assuming *arguendo* that *Wissner* and *Hisquierdo* has left open the character of federal military retirement benefits, then it must be a federal law that will govern the interpretation of a federal right. See *Free* v *Bland*, 369, U.S. 663, 8 L Ed, 2d 180, 82 S. Ct 1089 (1962). In *Free, supra*, United States Savings Bonds were issued to spouses living in Texas; the spouses were designated in the bonds as alternative co-owners. After the wife's death, the husband claimed exclusive ownership by operation of a treasury regulation providing that the survivor would be recognized as the sole and absolute owner. A son of the deceased wife by a previous marriage, as the principal beneficiary under her will, claimed an interest in the bonds by virtue of the state community property law. The Texas Supreme Court awarded the widower the title to the bonds, but also awarded reimbursement to the son for his half interest therein, making the bonds security for payment. The United States Supreme Court reversed the Texas decision holding that the Supremacy Clause of the Federal Constitution invalidated

the state law which conflicted with the U.S. Treasury regulations. The Supreme Court in *Free*, 8 L Ed 2d, at page 183 stated as follows:

> The Supreme Court of Texas' interpretation of the Supremacy Clause is not in accord with controlling doctrine. The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law *must prevail*. Article 6, Clause 2.
>
> This principal was made clear by Chief Justice Marshall when he stated for the Court that any state law, however clearly within a state's acknowledged power, which interferes with or is contrary to federal law, must yield. *Gibbons* v *Ogden*, (US) 9 Wheat 1, 210, 211, 6 L Ed 23, 73. See *Franklin National Bank* v *New York*, 347 US 373, 98 L Ed 767 74 S. Ct. 550; *Wissner* v *Wissner*, 338 US 655, 94 L Ed 424, 70 S. Ct. 398; *Sola Electric Co.* v *Jefferson Electric Co.*, 317 US 173, 87 L Ed 165, 63 S. Ct. 172.

This rationale makes it the obligation of a state court to recognize the supremacy of the federal statute and at the same time to set aside or disregard the state law that may be in conflict with the federal act. In the case at bar, there is no particular state statute which gives Respondent an interest in Petitioner's retirement pay. The trial court, in exercising its equitable powers held that the wife had an interest in her husband's military retirement pay. This equitable case law approach to the problem in light of the federal Supremacy Clause, creates an inconsistency and destroys the uniform application of the federal military law.

The *Free* court cited as authority *Wissner* v *Wissner, supra*, as authority for their holding that any state act in violation of the savings bond statute and/or regulations must fall under the Supremacy Clause. The *Free* court also made note of the fact that Congress had given the serviceman in

Wissner the right to select a beneficiary regardless of state law. In the case at bar, it is obvious that Congress gave Petitioner the right to name Respondent as a beneficiary under the Survivor Benefit Plan of 10 USC 1447 to 1455.

The Survivor Benefit Plan, 10 USC 1447, 1455, is pertinent to the case at bar for it demonstrates the limited interest a spouse may have in a retirement pay. In 1953, Congress enacted the Contingency Option Plan which allowed a retiree to provide an annuity for eligible widows and dependent children after he died. The Plan was subsequently renamed, "The Retired Servicemen's Family Protection Plan" (hereinafter referred to as the R.S.F.P.P.) and because of the inadequacies therein, Congress enacted the Survivor Benefit Plan, 10 USC 1447-1455 in 1972.

The R.S.F.P.P. was funded with deductions from the retiree's payments and continued even if there was no longer an eligible beneficiary. (U.S. Code Congressional and Administrational News, 90th Cong. Second Session 1968, Vol. 3, 3307). Congress rectified this anomaly by providing an automatic termination of deduction where there was no longer an eligible beneficiary (Id. at 3301-3306) and specified the reason therefor:

> To safeguard the participant's future retired pay when the spouse predeceases the member, *or a divorce occurs* . . .
>
> Id at 3307 (emphasis added)

It should be noted that the Survivor Benefit Plan is funded by deductions from the retiree's pay, and that the serviceman had to elect not to be covered. If the servicemen so elected, he was required to file written notice with the proper officials and to notify his spouse of said election. 10 USC 1448 (a). It should be further noted that the Survivor Benefit Plan as presently enacted allows the serviceman to provide an annuity for his dependent child and to exclude his spouse, and if he exercises this option, he is also required to

notify his spouse of his decision. Thus, it is obvious that a spouse of a serviceman can be excluded from any interest in the retirement pay of her spouse at the option of her spouse.

Congress, in enacting the Retirement Pay Plan for the military services and in particular in the Survivor Benefit Plan, set forth various definitions and in the course of doing so, did not define the term "ex-wife" or "ex-spouse" or "divorced wife".

It is clear that Congress has the wherewithal to define such terms and is aware of the particular problems of those individuals falling within these categories. The Congress, in the Social Security Act, 42 USC 416, set forth numerous definitions including definitions for the terms "divorced wife" and "surviving divorced wife". Those terms in essence mean a woman who had been married to an individual for a period of 20 years immediately before the date the divorce became effective. It is obvious that Congress, through their operation of the Social Security Act, intended to provide certain benefits to divorced women. The fact that Congress has not acted to provide benefits to a divorced wife under the Military Retirement Pay Scheme demonstrates that Congress has not in its wisdom seen fit at this stage to grant any rights in a retirement pay to an ex-spouse. Unless Congress acts, the courts of Michigan or any other states cannot establish new rights that do not exist within the parameters of the federal statute.

Assuming *arguendo* that a state court can create certain rights on behalf of an ex-wife in her husband's military retirement pay, then the state courts may also be able to create by judicial determination, rights of an ex-wife in other federal benefit plans. This proposition is clearly preposterous. Surely no one would contend that a ex-wife would have an interest in her husband's GI Bill Benefits, that being the right to use his rights to defray the cost of her education, nor could a state court create rights in the ex-wife in her husband's VA loan privileges, commissary privileges, military

hospital privileges or any of the other numerous benefits that flow to military personnel.

The Supreme Court of California in *In Re Marriage of Fithian*, 111 Cal. Rptr. 396 517 P 2d 449 (1974 Cal. S. Ct.) cert. denied 419 US 825, 95 S. Ct. 41, 42, L Ed 2d 48 (1974) and the Idaho Supreme Court in *Ramsey* v *Ramsey* 96 Idaho 672, 535 P 2d 53 (1975) have dealt with the question of whether or not military retirement pay is subject to division in a divorce action. Both state supreme courts rejected the argument that the area of military retirement benefits has been preempted by federal authority via the Supremacy Clause of the United States Constitution.

The California and Idaho Courts both established as their initial premise the military retirement benefits are property and thus subject to division. Petitioner submits that such a starting point is erroneous in light of the federal courts determination in *Watson* v *Watson*, 424 F. Supp (1976), that retirement pay "is remuneration for employment" and thus not property.

In *Ramsey*, the husband had served 17 of 20 years of service in the Air Force during his marriage, and at the time of dissolution, the Idaho court held that 17/20ths of the husbands military retirement pay was community property, and the wife was entitled to an interest in this proportion of the retirement pay. The Idaho Supreme Court in its concluding remarks held that the trial court was required to make a lump sum award for the present value of a 40% interest in the husband's military retirement pay based on the husband's life expectancy and on a discount rate of 6 percent. The *Ramsey* court at 535 P 2d, at page 57, set forth the generally recognized community property state position with reference to military retirement benefits:

> It is also generally recognized in community property states that military retirement benefits, to the extent that such benefits have vested or accrued while the husband and wife are domiciliary in a community property state, are community property subject to division between the parties upon dissolution of the marriage. *In Re Marriage of Wilson (Wilson* v *Wilson)*, 10 Cal. 3d, 851 112 Cal. Rptr. 405, 519 P 2d 165, (1974) *Smith* v *Lewis*, 107 Cal. Rptr. 95 (Cal. App. 1973); *Payne* v *Payne*, 82 Wash. 2d 573, 512, P 2d 736 (1973); *Morris* v *Morris, supra; Otto* v *Otto*, 80 NM 331, 455 P 2d 642 (1969); *LeClert* v *LeClert, supra, Busby* v *Busby, supra; Dominey* v *Dominey*, 481 SW 2d 473 (Tex. Civ. App. 1972); *Mora* v *Mora*, 429 SW 2d 660 (Tex. Civ. App. 1968).

The California Supreme Court in *Stenquist* v *Stenquist*, 148 Cal Rptr. 9, 582 P 2d 96, (1978) has rejected the application of the federal Supremacy Clause to federal military disability pay. A similar determination was made by the Washington Court of Appeals in *Jacobs* v *Jacobs*, 20 Wash. App. 272, 579 P 2d 1023, 1978, when it granted Mrs. Jacobs a lump-sum interest in her husbands *unmatured* military retirement pay.

Petitioner is aware of one non-community property state which has dealt with the allocation of a husband's military retirement benefits at the time of dissolution of a marriage. The New Jersey Supreme Court in *Krueger* v *Krueger*, 139, N.J. 413, At. 2d 340 (1976) relied on numerous decisions from community property states dealing with this issue and appropriated a portion of the husband's military retirement benefits to his former wife.

The threshold question is whether or not Congress has permitted state intervention in the military pay scheme. The federal statute, 10 USC 3911, *et. seq.* sets forth the eligibility requirements, the computation of pay and who shall receive benefits. The statute does not provide for payment of benefits to an ex-wife. This absence of authority precludes state intervention. The proposed state intervention here will stand as an obstacle to the accomplishments of the purpose and objectives of Congress.

The judicial grant of an interest in one's military retirement benefits will undoubtedly have an adverse affect on military morale. The United States Supreme Court in *Kewanee Oil Co.* v *Bicron Corp.*, 416 US 470, 40 L Ed 2d 315, 44 S. Ct. 1879, (1974) at 40 L Ed 2d 324, set forth the following rule in considering a Supremacy Clause issue.

> The question of whether the trade secret law of Ohio is void under the Supremacy Clause involves a consideration of whether that law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v *Davidowitz*, 312 US 52, 67, 85 L Ed 581, 61 S. Ct. 399 (1940). See *Florida Avocado Growers* v *Paul*, 373 US 132, 141, 10 L Ed 2d 248 83 S. Ct. 1210 (1963). We stated in *Sears, Roebuck & Co.* v *Stiffel Co.*, 376 US 225, 229, 11 L Ed 2d 661, 84 S. Ct. 784 (1964), that when state law touches upon the area of federal statutes enacted pursuant to constitutional authority, "it is 'familiar doctrine' that the federal policy 'may not be set by naught, or its benefits defined' by the state law." *Sola Electric Co.* v *Jefferson Elec. Co.*, 317 US 173 176, 87 L Ed 165, 63 S. Ct. 172 (1942). This is true, of course, even if the state law is enacted in the exercise of otherwise undoubted state power."

The federal statute dealing with military retirement pay is designed to give uniform application to all retired servicemen similarly situated. State court intervention in this realm will destroy the obvious intent of Congress to provide uniform benefits. The *Ramsey* majority at 535 P 2d 57, in footnote number two acknowledges the fact that a state law cannot "frustrate the express or implied purposes of the federal legislation." Uniformity of benefits is an obvious implicit intent of the federal legislation at issue.

The *Ramsey* court split 3 to 2 on whether or not this area had been preempted with the two dissenting Justices filing

separate opinions. Chief Justice McQuade felt that military retirement pay had been preempted by federal law. At page 62, Chief Justice McQuade referred to *Hart, the Relation between State and Federal Law*, 54 Co. L. Rev. 489, 529 (1954).

> For every instance in which Congress had made the choice expressly there are dozens in which it has left it uncertain. In such cases the Court has come to recognize with increasing candor in recent years, its duty to make the choice in Congress' behalf.

The choice in this matter should surely be that until Congress acts, an ex-wife has no interest in her ex-husband's retirement pay.

Judge B. Abbott Goldberg's article, *Goldberg, Is Armed Services Retired Pay Really Community Property?* 48 Cal State Bar J. 12 (1973), was cited as authority in both *Fithian* and *Ramsey, supra*. At page 15 and page 91, Judge Goldberg made the following observations:

> But nothing has been found to show that Congress ever conceived that retired pay would be treated as a species of partnership asset to be divided with a wife on divorce—a division converting the wife's share to separate property and giving her an interest in the retired pay regardless of her need or remarriage, and possibly inheritable by her successors on her death. Such community property concepts cannot be read into the federal statutes, as they have been read into the state retirement statutes, by showing that the federal statutes were "enacted in a community property context." Except for reference to the mode of computing the retirement income credit for federal income tax purposes in the service retirement guides, no mention of community property has been found in federal materials. Nothing has been found to indicate that Congress has ever considered treating retired pay as community property and thereby im-

> posing an obligation on the retiree unlimited by his ex-wife's need for support either in duration or amount. Congress' recent action confirms the inferences to be drawn from the earlier actions and statements, that retired pay is indeed a personal entitlement to the retiree, which accrues only to him, and in which his wife has no rights except as Congress gives them to her.

This total void of Congressional authority or intent to provide for a divorced wife mandates the determination that she has no interest in her ex-husband's military retirement pay.

As Justice Bakes stated in his dissenting opinion in *Ramsey, supra,* at page 64:

> However, as is often the case, *result oriented* decisions do the further disservice of making bad law.

Petitioner respectfully submits that the trial court's determination granting the wife a 50 percent interest in the husband's military retirement pay is an undue burden on the military retirement system in that it provides certain benefits payable to the former wife, which are not provided by statute.

The California Supreme Court in a case subsequent to the *In Re Marriage of Fithian, supra,* case has held that Social Security benefits pursuant to the Federal Social Security Act, are not subject to division in a divorce proceeding, and that community property principles cannot interfere with the Social Security system. The California Court made this finding in *In Re Marriage of Nizenkoff,* 65 Ca App. 3d, 135 Cal. Rptr. 189 (1977). In *Nizenkoff,* the husband was 41 years old and his wife was 69 years old and that the parties had been married for almost 20 years. At the time of the divorce, the wife was receiving Federal Social Security Old Age and Retirement Benefits, the husband claimed a 1/2 interest in these benefits. The California court first made

note of the fact that in order to qualify as a divisable community asset, the property must be a contractual right or property interest, and that a pension right became a property interest when the employer cannot unilaterally repudiate the right. The California court made reference to a U.S. Supreme Court case, *Fleming* v *Nester,* 363 US 603, 80 S. Ct. 1367, 4 L Ed 2d 1435 (1960), which rejected the argument that Social Security created either property or contractual rights. The California court also made reference to the fact that Congress in 1965 made certain changes in the Social Security Act to provide for benefits to a divorced wife or a surviving divorced wife providing them with certain benefits. The court indicated that these provisions demonstrate that Congress has considered the termination of a marital relationship by divorce and has expressly set forth a method for protecting the interest of a divorced wife. If Congress wanted to do the same with reference to Military Retirement Pay, they obviously have the experience and wherewithal to make provisions for those situations. The California court also made the observation that the Social Security Act was not to be interpreted by the variations and idiosyncrasies of local law citing *Wissner* v *Wissner, supra,* and pointed out that Congress did not intend that state courts rely on state family law concepts of support, alimony and community property in deciding whether or not an individual had rights in Social Security benefits. The California Supreme Court refused to allow the husband to have an interest in the wife's Social Security benefits.

It is Petitioner's contention here that since Congress did not expressly provide for a divorced spouse in the Military Retirement Act that the ex-wife has no standing to claim an interest in the Military Retirement benefits. Surely Congress did not intend that the various state family law concepts should dictate ones interest in Military Retirement benefits. The *Nizenkoff* court indicated that family law concepts could not dictate the entitlement to benefits under Social Security.

Since this Court's denial of certiorari in the *In re Marriage of Fithian* case, in 1974, numerous state appellate courts have dealth with the issue of whether or not an ex-spouse has an interest in the opposite spouses military retirement. The Colorado Supreme Court in *In Re Marriage of Ellis*, 538 P 2d, 1347, 552 P 2d 506, (1976), after reviewing numerous decisions of appellate courts in community property states, held that the husband's military retirement pay was not an asset subject to division in a divorce action.

The Colorado Court of Appeals in *Ellis* at 538 P 2d, 1349, made the following observation:

> Army retirement pay is something the soldier has earned, *Berkey* vs *United States*, 361 F 2d 983, 176 Ct. Cl. 1, and, because he is still subject to recall to active duty, *Lemly* vs. *United States*, 75 F. Supp. 248, 109 Ct. Cl. 760, is still earning, as a continuation of active duty pay on a reduced basis, *Hostinsky* v. *United States*, 292 F 2d 508, 154 Ct. Cl. 443. He has to serve at least 20 years to be eligible to retire, and can elect to retire at any time thereafter. 10 USC §3911. This right to retirement pay can be said to have "vested" after 20 years, but he cannot start to draw it until he does retire and is still alive and, therefore, the right is subject to divestment on prior death or discharge. The amount of retired pay is wholly within the control of Congress, is presently based on rank and length of service at time of retirement, and the retired soldier can expect increases or reductions which may be legislated from time to time. See 10 USC §1401a, §3961, and §3991; 6 CJS Army and Navy §20a (7).
>
> The full amount of the retired pay is taxable income under §61 (a) (11) of the 1954 Internal Revenue Code. The soldier makes no contributions to any retirement fund, nor is there any such fund under current law. See 10 USC §§3911 and 3991.

The observations made by the Colorado Court of Appeals in *Ellis* are undoubtedly applicable to the case at bar. The Arkansas Supreme Court in *Fenney* v *Fenney*, 537 SW 2d, 367, (1976), also held that a husband's right to receive military retirement pay was not subject to division in any divorce proceeding. It relied heavily upon the finding of *In Re Marriage of Ellis, supra*, in concluding that retirement pay "not yet due and payable, cannot be assigned, sold, transferred, conveyed or pledged." *Fenney, supra*, at Page 357. The Arkansas court felt the decisions of the community property states not to be persuasive in that in effect, those states were treating it as alimony in light of the collectibility problem created by 42 USC §659.

II THE DECISION BELOW CONFLICTS WITH DECISIONS OF FEDERAL COURTS IN THAT THE DECISION BELOW DETERMINED THAT FEDERAL MILITARY RETIREMENT PAY IS A MARITAL ASSET AND NOT WAGES OR IN THE ALTERNATE, THE SEPARATE ENTITLEMENT OF PETITIONER.

The threshold question is whether military retirement pay is property or just a different form of continued active duty pay.

Petitioner's right to receive his retirement pay is not a vested or contractual right. It is only created by statute and is subject to change by Congress. In *Andrews* v *U.S.*, 175 Ct. Cl. 561, (1966), Plaintiffs sued the United States to recover additional retired pay from June 1, 1958, to October 1, 1963, based on the fact that active duty pay had been increased and that their retired pay should be based on this increase. Congress had changed the retired pay scheme and was in the process of using a cost of living index to establish the "retired pay" scale. The United States Court of Claims in *Andrews* at page 563 stated as follows:

> The general rule has long been that [a] soldier's entitlement to pay is dependent upon statutory right

> * * * [and not upon] common law rules governing private contracts * * *. *Bell* v *United States*, 366 U.S. 393, 401 (1961). Ef., *Leonard* v *United States*, 279 U.S. 40 (1929); *United States* v *McDonald*, 128 U.S. 471 (1888); *Byrd* v *United States* 81 Ct. Cl. 409, cert. denied, 296 U.S. 598 (1935); *Fulmer* v *United States*, 32 Ct. Cl. 112 (1897); *Magaw* v *United States*, 16 Ct. Cl. 3 (1880); *Lowry* v *McCarl*, 79 F 2d 114, (D.C. Cir. 1935); *Heidt* v *United States*, 56 F 2d 559 (5th Cir., 1932). And since the pay of officers in the uniformed services is within the exclusive control of Congress, it was free to limit the benefits of the 1958 active duty pay increase to members on the active duty list.

The issue raised in *Andrews* v *United States, supra* was once again brought to light in *Abbott* v *United States*, 200 Ct. Cl. 384, (1973). In *Abbott*, plaintiffs argued that the changes made by Congress in the "retired pay" scheme deprived them of property without due process of law in violation of the Fifth Amendment to the United States Constitution. Plaintiffs argued that they had a vested right in the method of computing their "retired pay." The United States Court of Claims in *Abbott* v *United States, supra*, reaffirmed its holding that plaintiffs did not have a contractual right in their "retired pay."

Respondent herein argued in the trial court that the defendant's retirement pay was a vested asset because defendant was currently receiving payments. Petitioner respectfully submits that the mere fact that monies are presently being paid does not establish a vested right. Defendant's current military retirement income is compensation for non-active duty service. In *Watson* v *Watson*, 424 F Supp 866 (1976), the Federal District Court discussed at great length the status of a retired U.S. Army officer and the nature of his retirement pay. At page 868 the

Watson court stated as follows:

> There is no pre-existing retirement fund, earmarked for the use and benefit of George David Watson, defendant herein, in the United States Treasury. The defendant earns his retirement pay, like his pay when he was on active duty, by staying alive, obeying military discipline and being subject to recall to the active military service. In effect, the defendant continues to hold the same office, that is, a retired Colonel, that he held when he was on active duty, and he continues to receive compensation for his employment. As stated in *Hostinsky* v *United States*, 292 F 2d 508, 154 Ct. Cl. 443, (1961),
>
> > Plaintiff says a retired officer does not hold an office. We think that an officer in the Navy, though retired, is still an officer. He continues to draw pay as a retired officer; he draws it because he is still an officer. Being an officer, he is subject to recall to active duty at the will of his superiors. He is subject to recall whether he wishes to serve or not. He is still subject to naval discipline.

An officer's retirement pay is subject to increases, decreases and for various reasons it could be terminated. The *Watson* court at page 869 set forth the numerous situations in which a retired officer's retirement pay could be suspended or restricted.

> An officer's retirement pay is based upon the Consumer Price Index and can rise or fall an amount depending on the economy. As indicated above, the retirement pay can be stopped altogether with a violation of a retired individual of an offense against the Uniform Code of Military Justice. Retirement pay is also subject to modification under various federal laws intending to prevent conflicts of interest as was the subject of the case in *Hostinsky* v *United Stated, supra*, and as appears in various sections of the

> United States Code. Title 5, USC Section 5532 states that retired officers are subject to having their retirement pay reduced if they receive other employment. Title 5, USC Section 8312 states that retirement pay is subject to forfeiture upon conviction of certain crimes. Title 37, USC Section 801 restricts retired officers from working in defense work for private firms within three years after retirement. The United States Constitution itself, Articles I, Section 9, Clause 8, prevents retired officers from being employed by any foreign government. As alluded above, retired officers are subject to return to active duty whether they wish to or not, and are subject to good order and military discipline. Moreover, retirement pay is not inheritable, and does not pass to the heirs of the retired officer upon his death. As in the case of his active duty pay, once his services cease, his pay also ceases, whether active duty or retirement pay. Most importantly, retirement pay does not become vested in the retired individual except on a daily basis. Until and unless he lives from day to day, no right to retirement pay arises.

The Colorado Court of Appeals in *In Re Marriage of Ellis, supra*, also pointed out the fact that the federal courts have treated retirement pay as continuing earnings for past and future services rendered. At page 1349, the *Ellis* court stated:

> Army retirement pay is something the soldier has earned, *Berkey* v *United States*, 361 F 2d 983, 176 Ct. Cl. 1, and, because he is still subject to recall to active duty, *Lemly* v *United States*, 75 F. Supp. 248, 109 Ct. Cl. 760, is still earning, as a continuation of active duty pay on a reduced basis. *Hostinsky* v *United States*, 292 F 2d 508, 154 Ct. Cl. 443.

The Federal District Court in *Watson* v *Watson*, 424 F Supp. 866, 1976, held that the retirement pay was similar to wages for services rendered. A similar position was taken by

the Maryland Court of Appeals in *United States of America* v *Williams*, 370 At. 2d 1135, decided March 21, 1977. The Maryland Court of Appeals held that the Federal Military Retirement Pay equalled wages for purposes of their attachment statute. The *Williams* court relied on 15 USC §1672 (a) which provided that the term "earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commissions, bonus or otherwise and includes periodic payments pursuant to a pension or retirement program. The *Williams* court cited with approval the result reached in *Ellis* v *Ellis*, 552 P 2d 506, 1976, which indicated that retirement pay is not a vested interest subject to division in divorce.

The North Carolina Supreme Court in *Elmwood* v *Elmwood*, 295 NC 168; 244 SE 2d 668, (1978), has also held that retirement pay is "remuneration for employment." 244 SE 2d at 675. Also see *Phillips* v *Phillips*, 34 NC App. 612, 234 SE 2d 743, (1977).

Petitioner respectfully submits that because of the numerous and conflicting state appellate court decisions with reference to the allocation, status and treatment of military retirement benefits at the time of dissolution of a marriage, that the courts of the several states along with the bar are in need of a controlling decision by this Honorable Court in order to guarantee the uniform application of law to all present and former members of the military service and their spouses. This need is further evident by the several federal court decisions which have indicated that military retirement benefits are analogous to wages and have thus imposed limitations on the ability to collect pursuant to the terms of a Judgment of Divorce.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Petitioner, ROBERT LLOYD CHISNELL, respectfully requests that this Petition for a Writ of Certiorari be granted to review the State of Michigan

Supreme Court decision affirming the Michigan Court of Appeals decision in this action.

Respectfully submitted,

DANER, FREEMAN, MCKENZIE & MATTHEWS, P.C.
Attorneys for Petitioner

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Mount Clemens, Michigan 48043
Telephone: (313) 469-2633

Dated:

Order of Michigan Supreme Court

APPENDIX A—

Order of Michigan Supreme Court Denying Application for Leave to Appeal—November 29, 1978.

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 29th day of November in the year of our Lord one thousand nine hundred and seventy-eight.

Present the Honorable

THOMAS GILES KAVANAGH,
Chief Justice,

G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
MARY S. COLEMAN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices

CR 23-181 & a
COA: 72-2096
LC: 77-8220-DO

BEATRICE M. CHISNELL,
Plaintiff-Appellee,

v 61400

ROBERT LLOYD CHISNELL,
Defendant-Appellant.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

The motion for a performance bond and attorney fees is DENIED.

STATE OF MICHIGAN—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

[SEAL]

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 29th day of November in the year of our Lord one thousand nine hundred and seventy-eight.

(s) Corbin R. Davis, *Deputy Clerk.*

APPENDIX B—

Opinion of Michigan Court of Appeals—April 18, 1978

STATE OF MICHIGAN
COURT OF APPEALS

BEATRICE M. CHISNELL,
Plaintiff-Appellee,

v

ROBERT LLOYD CHISNELL,
Defendant-Appellant.

Docket No. 77-2096

Before: J. H. Gillis, P.J., Bashara and D.C. Riley, JJ.

DOROTHY COMSTOCK RILEY, J.

This case involves an issue of first impression in Michigan; *i.e.*, the treatment of military retirement pay in a divorce proceeding. The issue focuses on the question of whether the trial court erred in awarding plaintiff a one-half interest in defendant's net retirement benefits as part of a property settlement where no provision was made for alimony.

Defendant entered the United States Army in 1949 but he left the military in 1953. He re-enlisted in 1955, just prior to his marriage to plaintiff, and retired in 1972 as Chief Warrant Officer, fourth class.

No children were born of this marriage. The parties owned two lots and accumulated personal property, including several cars, a boat, a camper and a car trailer, some of which were encumbered by loans. In 1975, the plaintiff filed her complaint for divorce.

Following a bench trial, the court awarded plaintiff a divorce providing that neither party receive alimony and that

all of the marital property be sold, with the proceeds going first to settle the liens on the property and the remainder to be divided equally between the parties.

The court found that defendant, by virtue of his years of military service, was receiving military retirement pay of $9,600 per year. After deducting 20 per cent of this amount for taxes, the court awarded plaintiff, as part of the property settlement, one-half of the net amount, or $320 per month. The payments were ordered to continue until the death of either party.

Defendant contends on appeal that military retirement pay is not a marital asset subject to division in a divorce action property settlement. He argues that the retirement pay is analogous to wages, which can only be considered as a factor in granting alimony. Since no alimony was awarded here, defendant argues, plaintiff has no interest in the net retirement pay.

Although no Michigan case has precisely decided this issue, the parties have referred us to several cases from other jurisdictions where the question has been reached with conflicting results. Our analysis of these decisions leads us to the conclusion that, although the question is subject to considerable debate with defensible arguments on both sides of the issue, the trial court below correctly held that the retirement pay was an asset of the marriage subject to a property division.

It appears to be the uniform holding of the community property states that military retirement pay is community property, subject to division upon divorce.[1] The most comprehensive such opinion is that of the California Supreme Court in *In re Marriage of Fithian*, 10 Cal 3d 592; 111 Cal Rptr 369; 517 P2d 449 (1974).

[1] *Dominey* v *Dominey*, 481 SW2d 473 (Tex Civ App 1972), *Busby* v *Busby*, 457 SW2d 551 (Tex 1970), *LeClert* v *LeClert*, 80 NM 235; 453 P2d 755 (1969), *Wilder* v *Wilder*, 85 Wash 2d 364; 534 P2d 1355 (1975), *Ramsey* v *Ramsey*, 96 Idaho 672; 535 P2d 53 (1975).

The *Fithian* court stated that under their community property law, retirement benefits which are earned by one spouse as an element of compensation earned for work done during the course of the marriage are divisable upon dissolution of the marriage. Thus, the threshold issue was whether military retirement pay was intended as deferred compensation for the person's service prior to retirement, or payment for the limited status of the person after retirement.[2] The *Fithian* Court held:

> "[M]ilitary retirement pay must be realistically viewed as compensation for past, not present, services. Congress' purpose in creating the retirement pay system was to enhance the morale of the serviceman and to encourage him to remain in the military, and not to compensate him for his limited responsibility to the government after his retirement. Indeed, the amount of retirement pay a serviceman receives bears no relation to any continuing duties after retirement, but is calculated solely on the basis of the number of years served on active duty and the rank attained prior to retirement. (10 U.S.C. § 6323(e).) Moreover, should the serviceman actually be recalled to active duty, he is not only additionally compensated according to the active duty pay scale, but his rate of retirement pay is also increased thereafter. (10 U.S.C. § 1402.) The conclusion is inescapable that retirement pay is awarded in return for services previously rendered and therefore is divisible as community property to the extent the serviceman was married while on active duty." 517 P2d at 456-457.

The Court in *Fithian*, did not feel that this result was affected by the fact that the officer had not contributed,

[2] On retired status, the officer is subject to recall to active status, can be court-martialed for certain conduct and thereby lose the retirement pay, and is subject to various other provisions of Federal law. *See Ables* v *Ables*, 540 SW2d 769 (Tex Civ App 1976). *See also*, *Watson* v *Watson*, 424 F Supp 866 (E.D.N.C. 1976).

either directly or in the form of a payroll deduction, to the fund out of which the retirement pay is disbursed. The Court found the question of contribution irrelevant to the ultimate characterization of the benefits.

> "Although the retirement fund was noncontributory, husband's rights to the benefits vested during marriage and constituted an integral part of his compensation for service in the military." 517 P2d at 451.

Community property states are not the only jurisdictions to rule that military retirement pay is an asset of the marriage, divisable upon divorce. In *Kruger* v *Kruger*, 139 NJ Super 413; 354 A2d 340 (1976), the Superior Court of New Jersey, Appellate Division, held that the trial court had correctly distributed a share of the husband's retirement pay to the wife as a portion of the property division. No alimony was awarded.

The *Kruger* Court first considered the practical and financial aspects of terming such pay as an asset of the marriage rather than income to the husband.[3] The Court then cited from a number of community property cases, including *Fithian, supra*, which held the pay to be marital asset. The *Kruger* Court held:

> "We therefore conclude that both the retired pay and disability benefits which defendant husband has become irrevocably entitled to receive for the balance of his life constitute assets subject to equitable distribution to the extent that his entitlement thereto is based upon military service rendered during the existence of the marriage." 354 A2d at 344.

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[3] These considerations include the tax treatment of property divided upon divorce as opposed to alimony and the wife's right to receive payments after remarriage. In addition, if the pay was treated as income, the entire amount would be available for computation of alimony. If treated as an asset, the wife would have an interest only in that amount of pay that was earned during the years of marriage.

We recognize that the result reached by the Courts in *Fithian, supra*, and *Kruger, supra*, is by no means universal. Several jurisdictions have held military retirement pay to be an equivalent to wages, thereby constituting income to the retired spouse that is unavailable for distribution in a property settlement. In *United States* v *Williams*, 370 A2d 1134 (My Ct of App, 1977), the Maryland Court of Appeals, after having the question certified to them by the United States District Court, held that for the purposes of Maryland divorce law military retirement pay constitutes wages subject to garnishment for payment of an arrearage in alimony. A similar result was reached in *Watson* v *Watson*, 424 F Supp 866 (E.D.N.C., 1976), although the state's garnishment law altered the disposition of the case.

In *In re Marriage of Ellis*, 538 P2d 1347 (Colo App, 1975), *affirmed* 552 P2d 506 (Colo S Ct, 1976), the Colorado Court held that military retirement pay is not marital property since "[a]t no time has it any cash surrender, loan, redemption, or lump sum value." 538 P2d at 1349.

Although, as we have stated, no Michigan case has ruled specifically on this issue, the contrasting points of view in the previously cited cases were discussed by this Court in *Hutchins* v *Hutchins*, 71 Mich App 361; 248 NW2d 272 (1976). *In Hutchins*, the issue was the treatment of the husband's pension from the Michigan State Police. The Court noted that the pension question was one of first impression, so it turned to a consideration of analogous areas of law and to decisions of other states:

> "In our research in community and noncommunity property states, we find the courts holding that state pensions, private pensions, profit-sharing trust and *military pensions could be properly distributed as property* under a decree of divorce." (Emphasis added.) 71 Mich App at 365.

After discussing several of the cases concerning military retirement pay, and cases dealing with other forms of pensions, the *Hutchins* Court concluded:

> "Returning to the Michigan public safety department pension, accident and disability fund leads us, as do other jurisdictions with similar statutes, to the conclusion that it also treats the accumulated deductions in the husband's account in a manner which makes them marital property. Here, the plaintiff-husband's interest was created in most part from his salary, and we agree with the defendant-wife that these deductions would have been available to the parties during their marriage to be invested in stocks, bonds, savings account, annuity and/or other investments. The plaintiff-husband's right in the fund is fully vested and cannot be subjected to divestment or forfeiture, except as herein noted for breach of the public trust. We also hold that it is property that came to the plaintiff by reason of the marriage and therefore should be included in the total assets of the parties. As in New Jersey, our divorce laws make no reference to vesting. See MCLA 552.1 *et seq.*; MSA 25.81 *et seq*. Therefore, it must be included as an asset in the distribution of property." 71 Mich App at 370-371.

In the present case, we are persuaded by the decisions in *Fithian, supra, Kruger, supra,* and by analogy in *Hutchins, supra,* that defendant's military retirement pay was correctly categorized as a marital asset and included within the property settlement. As the *Hutchins* Court states, vesting is not a relevant consideration in our divorce laws. We find, as did the Court in *Fithian,* that military retirement pay is primarily deferred compensation for services rendered prior to retirement. This being the case, the fact that defendant did not have to contribute to a retirement pay fund does not distinguish this type of pension from that in *Hutchins*. Congress could have eliminated the retirement pay system and increased the rate of pay during active service. Since the

decision was made to provide for retirement benefits, the deferred compensation was not available to the parties during defendant's active service for use in other investments. Therefore, plaintiff, through her contribution to the marriage, obtained an interest in the marital asset of the earned retirement pay.[4] *Hutchins, supra.*

Defendant also contends that a decision by this Court that the retirement pay is a marital asset will conflict with the supremacy clause of the United States constitution[5] by interferring with Congress' exclusive power to raise and support armies. We note that this contention was answered contrary to defendant's assertions in *In re Marriage of Fithian, supra,* at 451-453. We concur in that reasoning and find no violation of the supremacy clause.

Defendant asserts that the division of property was inequitable and that the court should not have considered fault when making the property division. Fault is still a consideration in matters of property division, notwithstanding Michigan's no-fault divorce laws. *Kretzschmar* v *Kretzschmar,* 48 Mich App 279; 210 NW2d 352 (1973). Our reading of the record shows that the court considered fault in calculating the property division. Absent a showing of abuse of discretion, which has not been made here, we will not disturb the court's decision. See *Dougherty* v *Dougherty,* 48 Mich App 154; 210 NW2d 151 (1973); *Johnson* v *Johnson,* 346 Mich 418; 78 NW2d 216 (1956).

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[4] We note that, consistent with the decision in *In re Marriage of Fithian,* 10 Cal 3d 592; 111 Cal Rptr 369; 517 P2d 449 (1974), the trial court expressly stated that plaintiff's interest in the retirement pay will cease upon either the death of defendant or her death, whichever occurs first.

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[5] US Const, art 6, § 2.

Defendant finally challenges the trial court's award of $650 in attorney fees to plaintiff. Again, the granting of attorney fees in a divorce action is a matter of discretion. *Gove* v *Gove*, 71 Mich App 431; 248 NW2d 573 (1976). We find no abuse of that discretion in the present case.

Affirmed.

Costs to appellee.

APPENDIX C—

Judgment of Divorce of the Circuit Court for the County of Macomb — April 21, 1977.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

IN THE CIRCUIT COURT FOR
THE COUNTY OF MACOMB

BEATRICE M. CHISNELL,
Plaintiff,

-VS-

No. 75-8220-DO

ROBERT LLOYD CHISNELL,
Defendant.

THOMAS J. MC CALLUM (P17274)
Attorney for Plaintiff

JUDGMENT OF DIVORCE

At a session of said Court, held in the County Building, City of Mt. Clemens, State of Michigan, on April 21, 1977

PRESENT: HONORABLE HUNTER D. STAIR
Circuit Judge

This cause having come on for trial upon the Complaint of the plaintiff and the answer of the defendant and the parties having appeared in person and by counsel, and the Court having heard the testimony and evidence submitted and the arguments of counsel; and being fully advised in the

premises, this Court finds that the plaintiff has sustained the allegations contained in her Complaint and is entitled to a Decree of Divorce from the defendant.

NOW, THEREFORE, on Motion of Thomas J. McCallum, attorney for plaintiff,

ABSOLUTE DIVORCE

IT IS HEREBY ORDERED AND ADJUDGED that the marriage between BEATRICE M. CHISNELL, plaintiff and ROBERT LLOYD CHISNELL, defendant, be and the same is hereby dissolved and a divorce from the bonds of matrimony between said parties be and the same is hereby adjudged.

ALIMONY

IT IS FURTHER ORDERED AND ADJUDGED that neither of the parties hereto be awarded permanent alimony and none is ordered.

PROPERTY SETTLEMENT

IT IS FURTHER ORDERED AND ADJUDGED that the defendant, ROBERT LLOYD CHISNELL, shall pay to the plaintiff, BEATRICE M. CHISNELL, from the proceeds of his monthly vested pension with the United States Government as a result of his service with the Military Service of the United States, the sum of Three Hundred Twenty and 00/100 ($320.00) Dollars per month during the life of said pension, so long as the plaintiff shall live.

IT IS FURTHER ORDERED AND ADJUDGED that the parties' 1973 21-foot Bayliner boat with inboard-outboard motor and trailer be sold and the proceeds thereon divided equally between the parties hereto provided, however, that

any and all liens securing both boat, motor and trailer, up to the sum of Three Thousand Six Hundred and 00/100 ($3,600.00) Dollars be paid equally by the parties hereto and that any additional liens against said boat, motor and trailer, be paid by the defendant-husband individually. All proceeds of said sale exceeding Three Thousand Six Hundred and 00/100 ($3,600.00) Dollars shall be divided equally between the parties hereto.

IT IS FURTHER ORDERED AND ADJUDGED that the parties' 1971 Vagabond Trailer Coach and homemade trailer be sold and the proceeds divided equally between the parties hereto, provided however, that all liens on said trailer coach up to the sum of Four Hundred Thirty-Six and 51/100 ($436.51) Dollars be divided equally and paid equally by the parties hereto and that any liens exceeding the sum of Four Hundred Thirty-Six and 51/100 ($436.51) Dollars shall be paid by the defendant, ROBERT LLOYD CHISNELL, individually. The parties shall then divide equally all sums received in excess of Four Hundred Thirty-Six and 51/100 ($436.51) Dollars and divide same equally.

IT IS FURTHER ORDERED AND ADJUDGED that the parties' 1972 Chevrolet Carryall Van be given to the defendant, ROBERT LLOYD CHISNELL, subject to any and all liens thereon and that said defendant shall hold the plaintiff, BEATRICE M. CHISNELL, harmless from any obligation thereon.

IT IS FURTHER ORDERED AND ADJUDGED that each of the parties hereto shall have as their sole personal property, all right, title and interest in any accounts which such said parties should have with the Joint Military Services Credit Union and each party hereto shall hold the other harmless from any obligations to the Joint Military Services Credit Union for indebtedness carried in such party's name.

IT IS FURTHER ORDERED AND ADJUDGED that the real properties that the parties own in Luce County,

Newberry, Michigan, and Antrim County, Michigan, be sold and the proceeds divided equally between the parties hereto.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant, ROBERT LLOYD CHISNELL, shall have as his own personal belongings, all of his hand tools.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, BEATRICE M. CHISNELL, shall have and receive all of the parties' household furniture and furnishings as her personal property.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant, ROBERT LLOYD CHISNELL, shall discharge any obligations owing to Sears Roebuck & Company or Master Charge.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, BEATRICE M. CHISNELL, shall have and receive the 1973 Dodge automobile and hold the defendant harmless from any obligations thereon and that the plaintiff-wife shall also have and receive the 1970 Volkswagon automobile and hold the defendant harmless from any obligations thereon.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff-wife shall have and receive any and all items contained in a certain safe-deposit box with the Mt. Clemens Bank, located at the North Branch Office of said bank, the same being safe-deposit Box No. 3-000406-8.

IT IS FURTHER ORDERED AND ADJUDGED that savings accounts in the name of either of the parties hereto, be divided equally between the parties hereto.

ATTORNEY FEES

IT IS FURTHER ORDERED AND ADJUDGED that the defendant, ROBERT LLOYD CHISNELL, shall pay to

Thomas J. McCallum, attorney for the plaintiff, the sum of Five Hundred and 00/100 ($500.00) Dollars as an attorney fee in this cause forthwith.

INSURANCE POLICIES

IT IS FURTHER ORDERED AND ADJUDGED that any interest which either of the parties hereto may have had or now have in any of the insurance policies or contracts of the other party shall be, and is hereby extinguished. The parties hereto shall, in the future, hold all such insurance free and clear of any right or of any interest which the other may have had heretofore or may have therein or thereto by virtue of being the beneficiary, the contingent beneficiary or otherwise.

DOWER

IT IS FURTHER ORDERED AND ADJUDGED that the defendant, ROBERT LLOYD CHISNELL, shall pay to the plaintiff, BEATRICE M. CHISNELL, the sum of One and 00/100 ($1.00) Dollar which shall be in lieu of and in full accord and satisfaction of any and all claims on the part of the plaintiff, or account of dower in the lands of her husband, which he now owns or may hereafter own or have any interest in, and that he shall hereafter hold his remaining property, both real and personal, free, clear and discharged of any dower or claim of dower on the part of the plaintiff.

EXECUTION OF DOCUMENTS

IT IS FURTHER ORDERED AND ADJUDGED that each of the parties hereto shall execute such documents as are required by them to be executed to effectuate the terms of the within Judgment and that if either of the parties hereto fail to execute and deliver said documents, the other party

may cause a certified copy of the within Judgment to be recorded with the Office of the Register of Deeds for the County of Macomb, State of Michigan, and the Michigan Secretary of State's Office and such recordation in and of itself shall act in lieu of the formal execution of said documents.

EFFECTIVE DATE OF JUDGMENT

IT IS FURTHER ORDERED AND ADJUDGED that this Judgment shall be effective and final immediately upon entry hereof.

(s) Hunter D. Stair
CIRCUIT JUDGE

By (s) Marilyn Cline
DEPUTY CLERK

Approved as to form:

(s) Beatrice M. Chisnell,
Plaintiff

(s) Thomas J. McCallum
Attorney for Plaintiff

(s) Robert Lloyd Chisnell,
Defendant

(s) Gary E. Gendernalik
Attorney for Defendant